1996

Flanders & Associates v. R. Duane Layton : Reply Brief

Utah Court of Appeals

Shauna L. Kerr; Attorney for Appellee.
Brenda L. Flanders; Dena C. Sarandos; Flanders & Associates; Pro Se.

IN THE UTAH COURT OF APPEALS DOCKET NO. 960090-CA

FLANDERS & ASSOCIATES,	:	
Plaintiff and Appellant,	:	Case No. 960090-CA
vs.	:	Priority No. 15
R. DUANE LAYTON,	:	
Defendant and Appellee.	:	

REPLY BRIEF OF APPELLANT

APPEAL FROM ORDER STRIKING PLAINTIFF'S COMPLAINT AND JUDGMENT BY DEFAULT OF THIRD CIRCUIT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
Honorable Stephen L. Henriod, Circuit Court Judge

BRENDA L. FLANDERS (3075)
FLANDERS & ASSOCIATES
56 East Broadway
Suite 400
Salt Lake City, Utah 84111
Telephone (801) 355-3839
Appearing Pro Se

SHAUNA L. KERR (3659)
ATTORNEY AT LAW
P.O. Box 1480
Park City, Utah 84060
Telephone (801) 649-6718
Attorney for Appellee

IN THE UTAH COURT OF APPEALS

FLANDERS & ASSOCIATES,	:	
Plaintiff and Appellant,	:	Case No. 960090-CA
vs.	:	Priority No. 15
R. DUANE LAYTON,	:	
Defendant and Appellee.	:	

REPLY BRIEF OF APPELLANT

APPEAL FROM ORDER STRIKING PLAINTIFF'S COMPLAINT AND JUDGMENT BY DEFAULT OF THIRD CIRCUIT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
Honorable Stephen L. Henriod, Circuit Court Judge

BRENDA L. FLANDERS (3075)
FLANDERS & ASSOCIATES
56 East Broadway
Suite 400
Salt Lake City, Utah 84111
Telephone (801) 355-3839
Appearing Pro Se

SHAUNA L. KERR (3659)
ATTORNEY AT LAW
P.O. Box 1480
Park City, Utah 84060
Telephone (801) 649-6718
Attorney for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CASES

TABLE OF STATUTES, RULES AND ORDINANCES

IN THE UTAH COURT OF APPEALS

FLANDERS & ASSOCIATES,	:	
Plaintiff and Appellant,	:	Case No. 960090-CA
vs.	:	Priority No. 15
R. DUANE LAYTON,	:	
Defendant and Appellee.	:	

REPLY BRIEF OF APPELLANT

APPEAL FROM ORDER STRIKING PLAINTIFF'S COMPLAINT AND JUDGMENT BY DEFAULT OF THIRD CIRCUIT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
Honorable Stephen L. Henriod, Circuit Court Judge

Flanders & Associates ("F & A"), appellant herein, respectfully requests that this Court reverse the determination of the Third Circuit Court, the Honorable Stephen L. Henriod presiding, and provides its Reply Brief, as follows:

ARGUMENT I

F & A IS ENTITLED TO ASSERT THE PROTECTIONS OF RULE 60(b)

Essentially, the Brief of Appellee summarily asserts that because F & A is a law firm, it cannot make a mistake that is

excusable under the eyes of the law, which mistake would support a setting aside of a default judgment. Mr. Layton explains that attorneys are not allowed to make excusable mistakes because "the attorney and the litigant are one in the same and no inequity or injustice results". Page 11, Brief of Appellee. There is no legal authority to support this contention. It is true that sometimes a Court will not reverse a sanction that has occurred due to an attorneys failure, because the client has a remedy, *i.e.* the client can pursue the responsibility of the attorney. This, however, does not render Rule 60(b), *Utah Rules of Civil Procedure*, ineffective or inapplicable when an attorney makes a mistake. In numberless cases, Courts have set aside judgments that were entered due to attorney's mistakes. Rule 60(b) does not exclude lawyers from its coverage. The rule was enacted to protect people from mistakes that can happen, mistakes that should be excused because everyone, including attorneys, makes mistakes no matter how hard they try to avoid them.

Rule 60(b), *Utah Rules of Civil Procedure*, provides that

> On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons; (1) mistake, inadvertence, surprise, or excusable neglect; . . . (5) the judgment is void; . . . or (7) any other reason justifying relief from the operation of the judgment.

Clearly, Rule 60(b) is not intended only for the use of non-lawyers who do or do not have attorneys representing them. Unfortunately, even attorneys make mistakes; mistakes that should be forgiven.

In this case, a client, who had been a long-term friend, requested the firm's services. Services were provided as is demonstrated in the principal Brief filed by F & A. Mr. Layton was not happy about getting the divorce and this unhappiness hampered his ability to make decisions during the case and colored his expectations. F & A performed the services requested, but Mr. Layton did not pay.

F & A, finally, was required to pursue collection of the amounts due and owing. Mr. Layton counterclaimed for return of all of the money paid to F & A. The firm has demonstrated beyond contention not only that it earned the money paid by Mr. Layton, but also, that it provided services having a value substantially exceeding the amount paid. Mr. Layton has provided no legitimate defense for his failure to pay. The judgment entered against F & A results in the requirement that F & A provide $4,000.00 in services and costs to Mr. Layton for free because it made a mistake and missed a pretrial conference. Certainly, other sanctions were available and could have remedied any injury for F & A's failure to appear.

F & A admits that a mistake was made and that the mistake should not have occurred. F & A had devised procedures and systems to avoid just such an event. Yet, it did happen. Luckily, the mistake did not expose a client to an unjust result. It did inequitably effect F & A, however. In its Brief of Appellant, F & A explained in detail the procedures that have been taken to schedule and calendar all important dates. Due to circumstances outside of its control, F & A had been subject to an extreme change in staff. F & A is not asserting, contrary to Mr. Layton's accusations, that it should not be held responsible for the performance of its employees. F & A has provided substantial evidence that a mistake was made, a mistake that F & A had believed it had done everything possible to avoid.

In addition, sanctions other than entry of default were available to the Court. F & A could have been ordered to pay for Mr. Layton's time or travel expense, or some other sanction could have been entered to compensate Mr. Layton for the mistake made by F & A, but a sanction that would be less Draconian under the circumstances. Certainly, F & A has attended many pretrials where the other party has failed to appear, or where the Court has contacted by telephone the opposing party or counsel to obtain appearance. F & A is not suggesting that a Court has an obligation to remind parties of their responsibility to appear at hearings, however, in these other pretrials, no default or other sanction was

entered against the non- or late appearing party. The Court simply set dates, rescheduled the pretrial, or waited for the appearance of the party after the telephone contact. F & A regrets making the mistake, however, the degree of sanction is unjust. The firm should be allowed to proceed to the merits of its claims.

Brenda L. Flanders, the principal of F & A, has been practicing law for fourteen (14) years. During this time, she has handled thousands of cases, almost always without incident. During the fourteen years, however, she has made a couple of mistakes. Attorneys are human, they make mistakes and there is no legal justification for holding an attorney to a different standard under Rule 60(b), *Utah Rules of Civil Procedure*. Where a reasonable excuse is offered by the judgment debtor, courts generally tend to favor granting relief from judgment unless it appears that to do so would result in substantial injustice to the judgment creditor. *Westinghouse Electric Supply Co. v. Paul W. Larsen, Contractor*, 544 P.2d 876 (Utah 1975).

F & A has offered a reasonable excuse. The entry of judgment under these circumstances is inequitable and unjust. "[I]t is quite uniformly regarded as an abuse of discretion to refuse to vacate a default judgment where there is reasonable justification or excuse for the defendant's failure to appear, and timely

application is made to set it aside." *Mayhew v. Standard Gilsonite Co.*, 376 P.2d 951, 14 Utah 2d 52 (Utah 1962).

This Court of Appeals should reverse the trial court and remand this case to proceed on the merits.

ARGUMENT II

F & A HAS MET THE REQUIREMENTS OF RULE 60(b), THE JUDGMENT SHOULD BE SET ASIDE

Rule 60(b), *Utah Rules of Civil Procedure*, provides that a motion to set aside must be filed not more than three (3) months after the judgment, order, or proceeding was entered or taken. F & A complied with the requirement of Rule 60(b) by filing its motion within approximately two (2) months after the judgment purportedly was entered.

Excusable neglect and mistake are present in this case. Throughout the proceedings, F & A has responded promptly and punctually. F & A initiated this lawsuit and has a greater economic interest in this case as opposed to Mr. Layton. The Complaint filed by F & A should not have been stricken. F & A filed a reply to Mr. Layton's Counterclaim. In fact, it even filed a Certificate of Readiness for Trial, however, Mr. Layton had filed an objection thereto and a request for the Court to stay all proceedings. F & A reasonably believed that the Court would

respond to Mr. Layton's request to stay the proceedings prior to any further judicial activity. The Court, however, did not respond to Mr. Layton's request. F & A was prepared to proceed to trial and would have attended the pre-trial conference if it had been calendared. Unfortunately, the pre-trial conference was not calendared due to a mistake by F & A. That mistake arose from the substantial staff changes that have occurred at F & A within the last six months prior to the pre-trial conference, even though F & A diligently had attempted to avoid any such mistakes. The changes in staff included the loss of the office manager, who had worked for F & A for approximately five-and-one-half (5½) years, and who was the principal involved in calendaring events as notice was received. In addition, approximately one (1) month later, F & A lost the secretary who also had been working on these matters. F & A did take action to avoid any mistakes in calendaring. The firm holds weekly scheduling meetings and attempts to calendar all hearings, motions, responses to pleadings and the like. Further, as pleadings and correspondence are received by the firm, copies are made and delivered to the attorney responsible for the matter. Somehow, the date for the pretrial hearing inadvertently was not scheduled on the appropriate calendars. Considering the effort made by F & A to avoid such a mistake, and the reason for its occurrence, the failure to attend the pretrial hearing should have been ruled as excusable neglect, inadvertence and/or mistake to come within Rule 60(b), *Utah Rules of Civil Procedure*.

F & A has a meritorious defense to the Counterclaim filed by Mr. Layton and has a meritorious claim against Mr. Layton regarding payment for services rendered and costs incurred on his behalf. F & A provided appropriate and responsive legal services on behalf of Mr. Layton. The judgment against F & A was rendered on the basis of a claim that F & A was unjustly enriched by all of the money paid by Mr. Layton. The evidence in the record totally negates this claim. F & A provided services to Mr. Layton having a value exceeding $4,000.00, including the costs advanced on behalf of Mr. Layton. Mr. Layton entered into a contract whereby he agreed to pay for the services rendered and the costs advanced. He cannot demonstrate that F & A provided nothing of value to him.

ARGUMENT III

THE CIRCUIT COURT JUDGE SHOULD HAVE MADE FINDINGS ON ALL MATERIAL ISSUES

On December 15, 1995, the Honorable Stephen L. Henriod, Third Judicial Circuit Court Judge, denied the Motion to Set Aside Judgment filed by F & A. The Court entered a Disposition Summary denying the Motion to Set Aside. The law is well settled that it is the duty of the trial judge in contested cases to find facts upon all material issues submitted for decision unless findings are waived. *Boyer Co. v. Lignell,* 567 P.2d 1112 (Utah 1977). The court did not make any findings and did not request counsel to submit findings to aid the court in making the necessary findings

for this case. No findings of fact and conclusions of law as required by Rule 52(a), *Utah Rules of Civil Procedure*, were entered by the court. *Acton v. J. B. Deliran Co.*, 737 P.2d 996 (Utah 1987). Contrary to the assertions of Mr. Layton, F & A did not waive the requirement that the Court make such findings and conclusions. F & A did not default in its Motion to Set Aside the Judgment, and therefore, the requirement of entry of Findings and Conclusions continues, and has not been satisfied, by the trial court.

Further, a judgment was entered against F & A. This judgment dealt with the merits of the case. It is extremely difficult for Flanders & Associates to challenge a judgment on the merits without having the basis for the judgment in writing. Consequently, the Court should have provided findings of fact and conclusions of law.

Failure of the trial court to make findings on all material issues is reversible error unless the facts in the record are "clear, uncontroverted, and capable of supporting only a finding in favor of the judgment." *Kinkella v. Baugh*, 660 P.2d 233, 236 (Utah 1983). In addition, the findings of fact must show that the court's judgment or decree "follows logically from and is supported by, the evidence." *Smith v. Smith*, 726 P.2d 423, 426 (Utah 1986). The findings "should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate

conclusion on each factual issue was reached." *Rucker v. Dalton*, 598 P.2d 1336, 1338 (Utah 1979).

ARGUMENT IV

MR. LAYTON IS NOT ENTITLED TO SANCTIONS UNDER RULE 33, UTAH RULES OF APPELLATE PROCEDURE

This appeal is grounded in fact and law. F & A made a mistake and legitimately asserts that it comes within the confines and purpose of Rule 60(b), *Utah Rules of Civil Procedure*. Certainly, F & A is not doing anything to harass Mr. Layton. The law does not support the contentions of Mr. Layton that Rule 60(b) is not applicable because F & A is a law firm. Sanctions against F & A under Rule 33, *Utah Rules of Appellate Procedure*, are not appropriate in this case.

CONCLUSION

F & A has offered a "reasonable justification or excuse for its] failure to appear" and has made timely application to set ide the judgment. It has satisfied the requirements of Rule 0(b), *Utah Rules of Civil Procedure*. It was an abuse of iscretion for the trial court to refuse to set aside the judgment. *ayhew*, 376 P.2d 951. To allow Mr. Layton to obtain judgment gainst F & A without F & A having an opportunity to defend the ction constitutes an injustice that should not be allowed by this ourt.

WHEREFORE, F & A respectfully requests that this Court reverse the denial of the Motion to Set Aside Judgment, remand this case for further proceedings, and grant such further relief as the Court deems just and proper.

DATED this 30th day of July, 1996.

FLANDERS & ASSOCIATES

Brenda L. Flanders
Appearing Pro Se

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of July, 1996, I served the forgoing Brief of Appellee on the following, by depositing copies thereof in the United States mail, postage prepaid, addressed as follows:

Shauna L. Kerr
P.O. Box 1480
Park City, Utah 84060